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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 8[illegible]

MARGARET CHENOWETH, ET AL.,

Petitioners,

vs.

PAN AMERICAN PETROLEUM CORPORATION and THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

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Petitioners, Margaret Chenoweth, Stuart Hertz, Elnabelle Hertz, Anita Hoffman, Joseph Hoffman, Ward Holcomb, Loretta Holcomb, George Pyne, Esther Pyne, Victor Roterus, Florence Roterus, Joseph Schonthal, Shirley Schonthal, Eva R. Simons and Herbert A. Hoffman, pray that a writ of Certiorari be issued to review the judgment of the Supreme Court of Oklahoma, entered in the above case May 7, 1963.

OPINION BELOW

The opinion of the Oklahoma Supreme Court, reprinted in Appendix A hereto p. 1a, is reported at ..... P. 2d .....

The report and order of the Oklahoma Corporation Commission entered April 15, 1960, reprinted in Appendix B hereto p. 7a, is unreported.

JURISDICTION

The Judgment of the Oklahoma Supreme Court was entered May 7, 1963. Timely Petition for Rehearing was filed May 20, 1963 and was denied June 18, 1963. This petition is filed within the ninety day period provided therefore. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(3).

QUESTIONS

[1] Two different purpose applications for unitization are involved. The First was abandoned and its notice became functus officio and died. The hearing was on the Second for which there was no prerequisite published statutory notice.

Question: Is a new hearing based on a new notice necessary? Does the participation by the Petitioners in the hearings before the Commission, then, thereafter learning that the Commission was without jurisdiction at all, cure the fatal defect in the Commission's jurisdiction to act?

[2] The purpose of the Oklahoma Unitization Act is conservation of oil, a strategic natural resource. When the con-

servation need is "desirable and necessary," a State approved monopoly may be created to effectuate the purpose of the Act. The economy and in time of emergency, the national security may be involved.

Question: Can the police power of the State be invoked to serve the private profit structure of Pan American for a period of 7 years before the conservation need, the justifying public purpose, comes into existence, if at all?

[3] Eight tracts were capable of producing the Oil Creek. The Oil Creek was produced under the rule of capture from 7 tracts. The Willens B, the eighth tract, was withheld for salvage. Thereby, it was denied production under the rule of capture prior to unitization; and thereafter under the unit, it was denied 6.25% of the total unit production because it was withheld for salvage.

Question: Can a lessee who, in effect is a single trustee controlling a number of identical trust properties that are common to the same trust, grant treatment to 7 wells and tracts as a matter of right and arbitrarily withhold the same treatment from the eighth well and tract in the same class?

[4] The then practice was to make and accord to all wells and tracts a directional (slant hole) survey, essential to compute each tract's acre feet % in the Unit. The Willens A1 Tract 7, was excluded; admittedly, the well sand thickness and acre feet of pay assigned to the Willens A1 well and Tract 7, are erroneous, arbitrary and without basis. The Oklahoma Supreme Court holds that the assignment of erroneous well sand thickness to a well on a tract in a unit for secondary recovery, takes property without due process and denies equal protection under the Federal Constitution, 14th Amendment.

Question: Under like circumstances, where the same Federal right has been especially set up and claimed, can the protection of the Petitioners' Federal right be denied?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

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STATEMENT

[1-2] This cause originates under the Oklahoma Unitization Act, 52 O.S.A. 287.1 to 287.15, administered by the Oklahoma Corporation Commission. The purpose of the Act is conservation of oil and gas. To effectuate the purpose, a private monopoly is permitted to exist and function under the State's administrative sanction, if the conservation need is "desirable and necessary."

On April 15, 1960, the Act was used to create a non-conservation purpose unit that exists for 7 years before the conservation need takes into effect, the Pan American Eola NW Block Oil Creek sand unit; comprised of eleven 40 acre tracts, an area of 440 surface acres of which 363 acres are productive. Pan American, individually as to some and as a partner in others, owns, controls and operates all of the leases it seeks to unitize. A unilateral elective right is retained by Pan American to operate the Unit for private purpose and private profit and to invalidate the unit at any time before or after the conservation need takes into effect. (R. 256, Plan, p. 26):

> "*27.2 Termination by Operating Committee.* This Plan of Unitization may be terminated by the Operating Committee whenever such Committee determines that unit operations are no longer profitable, feasible or in the interest of conservation."

Two Applications to Unitize are involved. The First Application was filed November 13, 1959, it bears the Commission's filing stamp and is composed of two pages; page one, states the purpose, the conservation need, to-wit (Ap. 20a):

> "3. That said area is substantially depleted of oil and gas producible by primary means * * *"

This concerns the recovery of 569,300 barrels of secondary conservation oil. The mandatory prerequisite statutory notice of the hearing to be had on the First Application was published (Ap. 20a).

Subsequently, on November 16 or 17, 1959, the First Application was withdrawn and abandoned and the notice thereon became functus officio and died. Pan American, without notice or authority, arbitrarily removed and never returned to the Commission files, page one of its November 13, 1959 First Application and replaced it with a new and different purpose first page. It cannot be considered as a correction or amendment since it did not comply with Rules 1 and 6 which provide that once an Application has been filed, it can be corrected only on order of the Commission, Ap. 19a; any other method constitutes creating a special rule for a special case, prohibited under Oklahoma law. There then was nothing pending before the Commission on which it could act.

If the November 16 or 17 substituted page one is presumed to be the filing of a Second Application, then there is no mandatory prerequisite published notice of the hearing to be had thereon; the notice for the November 13, 1959 Application having become functus officio, cannot be revived to serve the new and different purpose November 16 or 17, Application.

The Second Application upon which the Oil Creek unit was created and operates, replaces the "desirable and necessary" conservation need with the Pan American desire to control the non-conservation primary oil under the monopoly authority during the period of time when the conservation need is not present, Ap. 20a.

> "That in order to delay the depletion of the reservoir energy, it is desirable to initiate some form of repressuring * * *"

Starting October 1959, 1,235,700 barrels of primary non-conservation oil must be recovered before the secondary recovery of 569,300 barrels of conservation purpose oil takes into effect. Based on estimated allowable and time of recovery at the rate of 175,000 barrels per year, it will take 7 years, or until 1967 before the secondary takes into effect, if at all.(1)

[3] An Oil Creek well that Pan American elects to test during the 3 month period of March, April and May 1958, shares equally in 50% of the Unit formula for participation. If 8 wells are tested, each is credited with 6.25% of the total unit production. The then practice in the field was to put the Oil Creek on production as an adjunct oil zone, dual completed to produce with either the Bromide or the McLish oil zones; Pan American established the practice. The Willens B wells which could meet these requirments, wrongfully, were excluded. The sequence in which the wells were drilled appears at Ap. 22a.

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(1) Mr. Paul Tiemeier, Pan American staff engineer, Cross Examination (R. 78, 79):

Q. Will you give me that figure please? A. We estimate that the increased recovery which will be obtained through secondary recovery operations will be 569,300 barrels of oil.

* * * * *

Q. How much more do you estimate you will recover by primary methods before your secondary recovery takes into effect? A. As of October 1st, 1959, we estimate that the future primary recovery at 1,235,700 barrels, which gives an ultimate primary recovery of 2,155,700 barrels.

* * * * *

Q. Your ultimate primary, but by including your estimated secondary, the total recovery would be 2,700,000 barrels, approximately? A. Yes, that's correct.

Pan American drilled on its own or as a partner, a total of 12 Oil Creek wells on 8 tracts, which included the Willens B1 Tract 6. It put 7 wells on 7 tracts on Oil Creek production and changed its procedure for the Willens B1 Tract 6, the 8th well and tract by electing to withhold the Oil Creek for salvage; instead of an Oil Creek dual completion with either the Bromide or the McLish, the Willens B2 well was dual completed in the Bromide and the McLish as offset protection against the Willens A1, Tract 7.

Subsequently, the offset Willens A1 was converted into a single completion that was used to produce the McLish only, the Bromide being shut in; and the Willens A2 also an offset, was drilled and used to produce dually, the Bromide and the Oil Creek. At this time the offset obligation to protect the Willens B Tract 6 Oil Creek against the Willens A Tract 7, Oil Creek, became due and owing. It was the then duty of Pan American not to discriminate against the Willens B wells and Tract 6, but to convert the Willens B1 into a single completion used to produce the McLish only and to shut in the Bromide; and then, timely to drill and dual complete the Willens B2 well to produce the Bromide and the Oil Creek.

We are not here concerned with the drilling of a new well at a cost of $300,000 (100,000 barrels at $3) to test or produce the Oil Creek.[2] Our concern is with the two wells on the

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[2] *Chenoweth et al* v. *Pan American Petroleum Corporation* (1963), 314 F. 2d 63, 65, 66. This action is between the same parties; it sought cancellation and money damage for failure to produce the Willens B lease Tract 6 (no other lease or tract involved) before the expiration of the primary term, July 18, 1957 and March 27, 1958 (two separate leases covering the same tract); and before the instant unitization proceeding was initiated, November 13, 1959. The Court held that a prudent operator would not drill a well

Willens B Tract 6, each of which has already been drilled and cased into the Oil Creek. The Willens B1, with casing set through 53 feet of net pay sand, needed only to be perforated to be tested or produced at no additional cost if done when drilled, at about $12,000 if done later, to get back $77,562, a substantial profit (25,854 bbls at $3 Pan American figures) plus bonus oil, an additional profit under the rule of capture. The Willens B2, required to be deepened 500 feet to test or produce 70 feet of net pay sand projected, at a cost of $13,792.

The Willens B1 completed May 24, 1955, was the second well drilled during the Oil Creek development program (Ap. 22a). On August 7, 1957, Petitioners requested that the Oil Creek be produced. On February 12, 1958, Pan American replied that they could not develop the Oil Creek on the Willens B Tract 6, because the Willens B1 had encountered the Oil Creek at the oil-water contact; a direct written misrepresentation to the effect that the well had zero feet of well sand thickness above water. This condition never existed. When Pan American wrote its February 12, 1958 letter, it had known for almost 3 years under their figures, the Willens

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(2) *Continued*

from top to bottom at a cost of $250,000 to produce 25,854 barrels at $3; that the Unitization order could not be litigated in the Federal Court while it was pending on appeal before the Oklahoma Supreme Court; *and pointed a means of measuring the duty of equal treatment, p. 65. "In cases questioning the development done by an operator under the prudent operator rule, the actions of the operator are examined item by item. This is essentially a comparison of his acts with standards or practices then prevailing in the area, all in the context of economics."* (Emphasis added)

B1 well had 28 feet of net pay well sand thickness above water, that they had recommended that it be produced;[9] and then

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[9] Exh. 33, Letter Feb. 12, 1958 (R. 266-267):

"* * * The Oil Creek sand was drilled, logged and eased off in Willens "B" Well No. 1. It was thought at the time of drilling that the Oil Creek might be productive. Subsequent testing of the Oil Creek in Shippey No. 1 and Willens "A" #2 revealed that the top of the Oil Creek sand in Willens "B" #1 was encountered at the approximate oil-water contact. * * * We, therefore, cannot develop the Oil Creek on the Willens "B" Lease." * * *

Mr. Paul Tiemeier, Cross Examination March 8, 1960 (R. 90, 91):

Q. On your calculations then there were 30 feet of effective Oil Creek in place under the Willens B, is that right? A. Approximately, yes.

Q. You knew that by reason of drilling the well, didn't you? A. Yes.

Chenoweth v. Pan American, 314 F. 2d 63, 65, 66, Cross Examination of Mr. C. D. Kerr, Pan American District Superintendent January 1962, Record in that case is not before the Court (224, 225, 226):

Q. So that your district level recommended to your upper level the Division, say, to test the Oil Creek? A. Yes, we worked it out. That's right, Barth. We have a group of engineers like Mr. Warren and Mr. Tiemier, staff engineers.

* * * * *

Q. But management upstairs, so to speak, did not concur in your recommendation; * * * A. No, * * * We agreed * * * to meet our direct offset. We had done it on the Willens A; and we thought that there we had possibilities for another well on the Willens B, so we did the same thing on the Willens B.

Q. So what you did then in effect was to modify your procedure and modify the recommendations in which you all concurred, by accepting the route of meeting the offset obligation? A. Yes, that's right.

changed their procedure and elected to withhold the Willens B1 Oil Creek for salvage.(5)

While discriminating against the Willens B1, at the same time Pan American, as an offset protection well to its Carpenter-Ferguson Unit A Tract 2, put its dual completed Carpenter-Ferguson Unit B Tract 1 on Oil Creek production

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(5) *Continued*

Q. Would it be a fair question to ask you as to whether or not at that time you did then abandon any idea of ever testing the Oil Creek after that and producing it on that tract? A. No, we didn't.

* * * * * *

Q. * * * When you drilled the B-1 well, you later abandoned it and drilled the B-2 well? A. Uh huh.

Q. Then you decided after you had penetrated the McLish in the B-2 not to go to the Oil Creek? A. That's correct, Barth.

Q. Well, at that time was there any discussion and did the company at that time decide that it would abandon any further operations on this tract with respect to the Oil Creek? A. No, * * *

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(5) Letter October 10, 1956, Amerada answer to Hart, no privity with the Petitioners, set out in Mr. Justice Bohanon's opinion Finding 7, attached to Pan American Supplemental Answer Brief; treated in Appellants' Response Brief p. 8, both briefs included in record to this Court; letter in part:

"* * * It is possible that a small amount of salvage oil might be recovered through the present bore hole at some future date, in view of this we are not agreeable to granting an outright release of this horizon * * *"

The single Oil Creek zone offer to Hart also contained in the letter, was meaningless; no less than the then standard or practice should have been offered, to-wit: a dual zone offer of the Oil Creek with either the Bromide or the McLish.

from 6 feet of well sand thickness (net pay), all that the well had; and with only 39,765 bbls originally in place, not enough to pay out a well cost of 100,000 bbls, produced under the rule of capture and before unitization, 136,216 bbls. (Ap. 22a). Already a recipient of a bonus of 96,451 bbls of overproduction, it was assigned in addition the producing well factor 6.25% of the total unit oil yet to be produced; and with the acre feet of oil originally in place long since exhausted, it was assigned additional acre feet % factor under the Plan; in both instances, above allowed bonus oil overproduction.

The Willens B1 well bore is lined with pipe 7 inches in diameter (casing); two strings of smaller diameter pipe (tubing) were run inside the casing. A 1½ inch string of tubing was used to produce the Bromide; within this 1¼ inch string of pipe mechanical difficulty developed. A 2 inch string of tubing was used to produce the McLish; there is no difficulty with the McLish tubing; the McLish production was shut in after it was unnecessarily duplicated in the Willens B2. There is no trouble with the 7 inch casing; it is not collapsed.[3]

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[3] *Chenoweth* v. *Pan American*, 314 F. 2d 63,
Direct Examination of Mr. C. D. Kerr, Pan American District Superintendent; record (217) in that case is not before the Court:

Q. Now what was the net result of that trouble on the productivity of the (Willens B1) well? A. Well, it was impossible to produce the Bromide. We were able to bring our production back all right from the McLish zone, but we had a swab stuck in the inch and a half tubing with about 4000 feet of wire line on top of it, and we just didn't have a chance to get any (Bromide) production.

Failure to test or produce the Willens B Tract 6, Oil Creek discriminated against and divested the tract of 6.25% participation in the total unit production to which it is entitled; this 6.25% arbitrarily was divided by Pan American among its 7 other wells and tracts that it had chosen to test. Pan American assigned to the Willens B Tract 6, erroneous participation of 0.554290% in the Unit; correct Unit participation for the well and additional acre feet is 7.328811% (Ap. 22a).

[4] Also, the Unit formula for participation assigns 50% of the total unit production to acre feet of net pay sand; each tract participates on a proportionate basis to its acre feet. Unless the same method is used to compute all tracts, there is discrimination against the excluded tract. The Willens A1 Tract 7, well and tract, with no vertical correction made and assigned erroneous well sand thickness, admittedly was excluded.

The practice was to make a necessary directional survey (slant hole survey) and based thereon to make two essential corrections, 1) the deviation or drift of the well away from the surface location; this bears on the area extent of the pay sand and fixes the subsurface position of the well in the Oil Creek, with respect to lease lines; 2) the vertical correction, which must be applied to obtain correct well sand thickness; this elevates the well and adds to the well sand thickness above water, in the well and in the tract. All three steps are essential.

Pan American admits that it made the three operations for all of its necessary wells, except its necessary Willens A1 Tract 7. For the Willens A1 Tract 7, no directional survey was made; drift direction and distance was guessed; and no vertical correction was made. Pan American admits that without the vertical correction it could not and did not compute correctly the amount of effective pay sand under the Willens A Tract 7; and, arbitrarily and without basis, assigned to the

Willens A Tract 7, an unfair percentage in the acre feet allowance for the Unit participation.[6]

The vertical correction made by Pan American for all of its wells and tracts but denied to the Willens A Tract 7, added 12 to 118 feet of additional well sand thickness to the wells and tracts there involved. Instead of the vertical correction, erroneous well sand thickness was assigned to the Willens A1 Tract 7. A substantial error as shown by the net 6 feet of the Carpenter-Ferguson Unit B which produced 136,216 bbls prior to unitization.

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[6] Mr. Paul Tiemeier, Pan American staff engineer, Cross Examination:

(R. 199-200) Q. Now then, in your Willens A1 there was no directional survey made, was there? A. No, sir.

Q. All these other tracts you have compensated from the angle or the deviation from vertical in computing your formula, haven't you? A. Yes, sir.

* * * * *

(R. 200) Q. Now Mr. Tiemeier, did you make any correction of any deviation from vertical in computing your formula on the Willens A1 tract? A. Our formula is based on our isopach map.

Q. * * * But did you take into account any correction for deviation from vertical on that tract (Willens A)? A. No, sir.

* * * * *

(R. 202) Q. Did you make any correction for a vertical deviation? A. No.

Q. Now, you'd have to know that (vertical correction) in order to be able to compute the amount of effective pay sand under this tract, would you not? A. Yes.

Error in the well sand thickness assigned to a tract included in a unit for secondary recovery, takes property without due process and violates the Federal Constitution, 14th Amendment.[6] Pan American assigned to the Willens A Tract 7, erroneous participation of 11.531288%; correct participation is 12.936157%, an error of 1.4%. The error on the Willens B Tract 6, is 6.8%. The two errors translate into $53,083.00 wrongfully and without due process, taken from the Petitioners (Ap. 22a).

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[6] *Philtex Oil Co. et al* v. *Corporation Commission of the State of Oklahoma et al*, No. 38642, In The Supreme Court of Oklahoma; case unreported; Opinion Oct. 4, 1960; appended to Appellants' Petition (White Brief 22a) submitted to the Oklahoma Supreme Court (Included in record).

The proponents of the Plan assigned a well sand thickness of 100 feet where the electric log of the well showed that 87½ feet was the most that could be assigned. The Court states: "* * * the D sand thickness attributed to some tracts as a factor in their shares of participation in the unit's production, is unjustified, arbitrary and unsupported by the evidence," and (at p. 2a) Syllabus 3 in part, this "* * * take(s) property from some owners without due process and violate(s) the United States Constitution's Fourteenth Amendment, and the Oklahoma Constitution's Art. II, Secs. 7, 23 and 24 * * * in so far as certain tracts were given participation in such future secondary recovery on the basis of certain well's sand thicknesses, which all of the direct and specific evidence tended to show was erroneous."

REASONS FOR GRANTING WRIT.

[1] The question is whether the April 15, 1960 Unit Order could be made at all. Until the jurisdictional prerequisites are met, there is no jurisdiction in the Commission to make a valid order, *Wilcox* v. *Walker*, (Okl. 1934) 35 P. 2d 893, 894.

Jurisdiction here hinges on whether the November 13, 1959 notice exists to serve as the notice for the different purpose November 16 or 17, Second Application. Based upon *Wilcox* v. *Walker*, 32 P. 2d 1044, 1049-1052 (Okl), when the November 13, 1959 First Application was withdrawn and abandoned, the November 13 notice became functus officio and ceased to exist. The lower Court distinguishes the *Wilcox* case by noting that in it, there was no notice (Ap. 6a); however, the *Wilcox* case specifically holds that if there had been a notice, it would have become functus officio, *Wilcox Oil & Gas Co.*, v. *Walker, et al.* 32 P. 2d 1044, 1051:

> "• • • The order of proration died and became functus officio, and had proper notice been given, admittedly not given by law, the notice on which said order was based would likewise have served its necessary function and purpose. Before another valid order of proration could be made, a new hearing was necessary, based upon a new notice. • • •"

Jurisdiction in the Commission is based upon mandatory prerequisite publication of notice by the Commission. In no other way can notice be given (Rule 4, Ap. 19a). *Wilcox* v. *Walker*, 32 P. 2d 1044, 1048, 1051, holds that taking part in the proceedings does not supply the notice and does not cure the fatal defect in the Commission's jurisdiction; that absent jurisdiction and the proceedings are deprived of their effectiveness for any purpose; and constitute a denial of due process under the Federal Constitution, 14th Amendment.

The unauthorized withdrawal of the First Application and the substitution of the different purpose Second Application cannot be considered as a correction or amendment since it did not comply with the Commission's Rules 1 and 6 which provide that this can be done only on order of the Commission (Ap. 19a). To do otherwise, is to now make a special rule to revert back to cure an existing fatal defect in the Commission's jurisdiction; this is prohibited under *Wilcox Oil and Gas* v. *State*, 19 P. (2d) 347, 350, which holds that the Commission's rules must be made by general orders applicable to all cases. It may not make special rules for special cases.

If the November 13 First Application had been amended, it would so appear in the docket, which it does not; and it would be physically present in the Commission files and impeach the Second Application. *Henderson* v. *Shell Oil Co.*, 173 F. 2d 840. The absence of the present necessary conservation need forced the physical withdrawal and abandonment of the First Application. The Second Application accomplishes illegal monopoly control of the primary oil and the productive acreage for private purpose and use until such future time as the necessary conservation need should come into existence, if ever (Ap. 20a). If the Second Application had been filed on November 13, 1959, it would bear the Commission's filing stamp, a simple mechanical stamping act if done on that day. However, it is admitted and not denied that the withdrawal and substitution of the key pages took place on November 16 or 17, 1959 and that there is no notice of the hearing to be had thereon.(8)

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(8) The question of notice and jurisdiction is discussed in Supplemental Reply Brief, Petition for Rehearing, Response to Applicant's Supplemental Brief, excerpt from p. 4:

Q. * * * Is this statement correct Mr. Peterson? Were you present at the time the first page of the November 13

The hearing was on the Second Application; before a valid Order could be made, a new hearing was necessary based upon a new notice.

Similar circumstances in *Wilcox v. Walker*, 32 P. (2d) 1044, constitute denial of due process under the Federal Constitution 14th Amendment and were there protected. It is obligatory on the lower Court to apply the law equally to all in like circumstances and thus to also protect the Petitioners' Federal rights. *Hill v. Texas*, 316 U.S. 400, 406; 86 L. ed. 1559, 1563; 62 S. Ct. 1159; *Maxwell v. Bugbee*, 250 U.S. 525, 541; 63 L. ed. 1124, 1132; 40 S. Ct. 2; *Southern By R. Co. v. Greene*, 216 U.S. 400, 412; 54 L. ed. 538, 539; 30 S. Ct. 287.

[2] The authority of the Commission and the purpose of the Act, are confined to the conservation of oil and gas, a strategic natural resource. The aim of unitization is present efficient use with a minimum of loss by underground waste, oil left in the reservoir that could be produced. The general public welfare and the national security are involved. 52 Okl. St. Ann Secs. 287.1, 2, 3, Ap. 17a; *Spiers v. Magnolia Petroleum Co.*, 206 Okl. 510, 244 P. 2d 852, 856, 857.

The April 15, 1960 Unit order creates a conservation authority that is not needed for 7 years, 1967 or later, if at all. This constitutes a future purpose for which the Act does not

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(1) *Continued*

Application was withdrawn and the first page of the November 17 Application was substituted? A. Yes, sir. The only question I have is to whether it was November 16 or 17, sir.

Q. You saw it happen? A. Yes, sir.

provide and its creation is an illegal extension of the authority delegated to the Commission.[6]

The controlling feature of the Unit Plan is the unilateral power given to Pan American to gear the unit operation to its own private profit structure, to-wit (R. 256, Exh. A p. 26):

> "Article 27.2 *Termination by Operating Committee.* This Plan of Unitization may be terminated by the Operating Committee whenever such Committee determines that unit operations are no longer profitable, feasible or in the interest of conservation."

Under this unitization practice, companies may acquire large amounts of productive acreage and procure a unit authority when the conservation need is not present; and then, by drilling one or more wells and elect to produce only one, perpetuate their control of the unitized area; thereby barring competitive development and production by others.

Conservation does not envisage control of the domestic acreage and production for non-use. The affect upon the economy can be extensive and serious. The same operator holding domestic acreage and controlling production therefrom, likewise may be holding and controlling foreign acreage and production; and weighs side by side which, and how much from each, it will permit to compete in the domestic market; all based upon the operator's standard or desirability as to which will yield more profit. Pan American operates on a world-wide and interstate scope (self publicised). If more profit can be had in another state, emphasis may be in that direction; if still more profit can be had by relying on foreign import oil,

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[6] The Briefs below are included in the record to this Court. The Petitioners' Federal rights are especially set up and claimed in Appellants' Petition (White Brief pp. 2-3); also see Initial Brief pp. 4, 75, 76, 77; Reply Brief pp. 2-7, 38; Supplemental Reply Brief pp. 9-14.

the emphasis again may shift. In effect, the domestic production price structure then, is linked to the price structure of a foreign economy. Under these conditions, the oil in the domestic unitized reservoir may never be profitable enough to produce.

Assuming a comparable course of action by those domestic companies that are able, and it is possible under this unitization practice, the curtailment of the domestic production and its removal from the domestic market becomes ever enlarged while the reliance on foreign import oil becomes increasingly pronounced; all of which may seriously affect the domestic producing structure. Then, in time of national need or emergency and when the national security is involved; and when full scale use of the domestic production industry is vitally essential, it may not readily be geared for full scale use.

There is no mandatory requirement on Pan American to initiate unitization; if it does, the justifying public purpose, the "desirable and necessary" conservation need must exist. (Legislative Finding 287.1, Ap. 17a). When Pan American causes the police power of the State to be invoked for the general welfare and the common good, it has taken upon itself by choice, a duty to serve that cause. This duty does not exist at its own caprice or to serve only the more profit desirability of Pan American.

The Petitioners here, wrongfully are compelled to yield their private property for the benefit of another private person without a justifying public purpose. *Thompson* v. *Consolidated Gas Utilities*, 300 U.S. 55, 80; 81 L. ed. 510; 57 S. Ct. 364. These private rights may not be annihilated. *Grison Oil Corp.* v. *Corporation Commission*, 186 Okl. 548; 99 P. 2d 137; and the power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Railroad Commission cases 116 U.S. 307, 331; 29 L. ed. 636; 6 S. Ct. 334.

[3] In *Chenoweth v. Pan American Petroleum Corp.*, (10th C. 1963) 314 F. 2d 63, 65, the Court found:

> "In cases questioning the development done by an operator under the prudent operator rule, the actions of the operator are examined item by item. This is essentially a comparison of his acts with standards or practices then prevailing in the area all in the context of economics."

We think this means that all wells and tracts in the same class are entitled to equal treatment. In effect, it holds that the Willens B1 or B2 wells should have been tested or put on production in like manner as were the other Oil Creek wells; and it is incumbent upon the Jewey Court to treat this as having been done and thereby assign the 6.25% well factor to the Willens B Tract 6. *Buckington v. Wilmington Parking Authority*, 365 U.S. 715, 725; 6 L. ed. 45, 52; 81 S. Ct. 856.

The Willens B Tract 6 is the only tract on which an Oil Creek well was drilled that can be commercially produced, but that was not tested or produced. It should not have been excluded from but should have been accorded, the same then practice of the offset protection and development in the Oil Creek as had been accorded to the adjoining offset Willens A Tract 7. The discriminatory and different practice, that of withholding the Oil Creek for salvage, was reserved exclusively for the Willens B Tract 6.

The arbitrary assignment of erroneous well sand thickness of zero feet to the Willens B1 well and using this as the reason for not testing or developing the Oil Creek while knowing that the well had 28 feet of well sand thickness above water under their own figures, and the Willens B2 had 70 ft. projected, takes the Petitioners' property without due process; thereby, the Willens B Tract 6 was denied 6.25% participation in the total unit production. *Phillips Oil Co. v. Corporation Commission*, supra 15n.

Due process and equal protection of the laws are not mere formalities; they are substantial Federal questions that have been asserted as having been violated and denied to the Petitioners. (See Appellants' Petition (White Brief) pp. 3-7, in lower Court) The lower Court may not disregard these inalienable rights. Oklahoma Constitution, Art. IX, Sec. 20, (Ap. 16a); *Philter Oil Co.* v. *Corporation Commission*, ib; *Special Indemnity Fund* v. *Hunt*, 190 P. 2d 795 (Okl); *Wilcox* v. *Walker*, 32 P. 2d 1044, 1048; *Carter Oil* v. *State*, 240 P. 2d 787. And it is within the province of the Federal Court to inquire therein. *Norris* v. *Alabama*, 294 U.S. 587, 589, 590; 79 L. ed. 1074; 55 S. Ct. 579; Mr. Chief Justice Hughes speaking for the Court, stated:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been especially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires examination of the evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a State Court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

Rights that exist to 7 wells and tracts in a class, exist to the eighth well and tract in the same class. The Pan American position is that of a single fiduciary controlling identical trust properties common to the same trust; under the then practices, none should be favored, none should be discriminated against. The granting of treatment and protection to the Pan American other tracts and wells as a matter of right and arbitrarily denying it to the Willens B wells and Tract 6, which

are identically situated, takes the Petitioners' property without due process and denies equal protection of the laws. *Truax* v. *Corrigan*, 257 U.S. 312, 332, 333; 66 L. ed. 254; 42 S. Ct. 124; *Phillips Petroleum Co.* v. *Peterson*, 218 F. 2d 926, 933, 934 (10th C. 1954); *Bolling* v. *Sharpe*, 347 U.S. 497, 499; 98 L. ed. 884, 886; 74 S. Ct. 693; *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515, 522; 73 L. ed. 483, 488; 49 S. Ct. 235; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 37; 72 L. ed. 770, 774; 48 S. Ct. 423; *Maricell* v. *Bugbee*, 250 U.S. 525, 541; 63 L. ed. 1124, 1132; 40 S. Ct. 2; *Southern R. R. Co.* v. *Greene*, 216 U.S. 400, 412; 54 L. ed. 536, 539; 30 S. Ct. 287.

[4] The Unit Act requires that the Petitioners' correlative rights be protected, not discriminated against (Ap. 17a). To protect, it is essential that the method to obtain the Willens A1 well sand thickness and the acre feet of pay under Tract 7, item by item, be the same as that used by Pan American on its other wells and tracts. *Chenoweth* v. *Pan American*, 314 F. 2d 63, 65. The necessary directional (slant hole) well survey and vertical correction based thereon, admittedly were not made for the Willens A1 well.

No vertical correction was made for the Willens A1 well; thereby it was denied 12 to 118 feet of additional well sand thickness. Pan American admits that it was not able to compute the Willens A1 well sand thickness and the acre feet of pay in the Willens A Tract 7, (Note 6 supra 14). The result is arbitrary assignment of erroneous well sand thickness and acre feet of pay for the Willens A1 well and Tract 7. This affects directly and makes erroneous the unit formula participation per cent assigned to each of the eleven tracts in the Unit.

The lower Court has found that erroneous well sand thickness assigned to a well in a Unit for secondary recovery, takes property without due process and violates the Federal

Constitution, 14th Amendment guaranteed. *Phillips Oil Co. v. Corporation Commission of the State of Oklahoma*, Supra 15n. Syllabus in part:

"3. In view of the particular characteristics of the Velma-Sims oil and gas reservoir, and, of the changes (which the evidence tended to show) had occurred in it since it began producing, neither the Plan submitted to unitize it for future secondary recovery, nor its formula for each tract's participation in said recovery, violated Title 52, O. S. 1951, secs. 287.4 and .5, nor did they, and/or the Corporation Commission's order approving them, take property from some owners without due process and violate the United States Constitution's Fourteenth Amendment, and the Oklahoma Constitution's Art. II, secs. 7, 23 and 24, *except in so far as certain tracts were given participation in such future secondary recovery on the basis of certain well's and thicknesses, which all of the direct and specific evidence tended to show, was erroneous.*" (Emphasis added)

The protection of the Petitioners' Federal rights is not discretionary with the lower Court. Where conditions exist, as in the *Phillips* case, that are found by the State Court to violate the 14th Amendment, the paramount Federal rights must be and were protected. When similar conditions exist in another case before the same State Court, equal justice requires that protection of the Federal rights may not be withheld; they likewise must be protected and any acts that infringe these rights must be held void. *Hill* v. *Texas*, 316 U.S. 400, 406; 86 L. ed. 1559, 1563; 62 S. Ct. 1159. *Southern R.R. Co.* v. *Greene*, 216 U.S. 400, 412; 54 L. ed. 538, 539; 30 S. Ct. 287.

The granting of relief and equal justice on an elective basis as a matter of right to some, and arbitrarily not to the Petitioners who are identically situated, denies equal justice, and is within the prohibition of the Federal Constitution;

Barbier v. Connolly, 113 U.S. 27; 28 L. ed. 923, 925; 5 S. Ct. 357; *Bolling v. Sharpe*, (1953) 347 U.S. 497, 499; 98 L. ed. 884, 886; 74 S. Ct. 693.

CONCLUSION

For the reasons stated, the Petitioners respectfully pray that the Writ of Certiorari be granted.

Respectfully submitted,

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